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No. 74-1232

In the Supreme Court of the United States

OCTOBER TERM, 1974

BELTRONICS, INC., *Petitioner*

v.

EBERLINE INSTRUMENT CORPORATION,
CAPCO, INC.
and
WESTERN ELECTRIC COMPANY, INCORPORATED
Respondents.

BRIEF OF RESPONDENT WESTERN ELECTRIC COMPANY, INCORPORATED, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT WESTERN ELECTRIC IN OPPOSITION

Respondent Western Electric Company, Incorporated, referred to herein as Western Electric, opposes the Petition for a writ of certiorari.

Petitioner is referred to as Beltronics. Respondents Eberline Instrument Corporation and Capco, Inc., are referred to as Eberline and Capco, respectively.

QUESTIONS PRESENTED FOR REVIEW

The questions for which Petitioner seeks a writ of certiorari are not properly before the Court. The questions presented are ones upon which the trial court did not receive evidence, did not make findings of fact and did not render conclusions of law. Hence, Petitioner's questions are not appropriate for certiorari.

Furthermore, Petitioner's questions misrepresent the operative facts and legal issues. This action arose, as it concerns anti-trust issues, because Western Electric refused to do any further business with Petitioner after learning that the Petitioner had bribed Western Electric employees with favors, had improperly obtained and used Western Electric internal and confidential price lists and had deliberately deceived Western Electric as to the Plaintiff's true business function and operations. Because of Western Electric's decision, Petitioner charged Western Electric and the other Respondents with a boycott and conspiracy to boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The questions presented for certiorari do not frame those facts or issues.

Finally, Petitioner's questions are argumentative and inaccurate. Question Nos. 1 and 2 are designed to give the impression that this case involves the distribution and sale by Western Electric of cable and wire for purposes of resale. The fact is that this case involves the purchase by Western Electric of capacitors and capacitor cases manufactured by Eberline and Capco. Cable and wire were only one of many component parts of those products. Western Electric merely furnished the wire and cable which were to be incorporated and fabricated into the products in order that the products could achieve the necessary performance requirements. Thus, Western Electric is purchasing, not distributing, products. Petitioner's questions do not fairly and objectively set forth that circumstance.

STATEMENT OF THE CASE

On August 1, 1968, Western Electric contracted with Eberline to purchase capacitors and capacitor cases, which were products manufactured by Eberline's subsidiary. At that time, Beltronics was a wholly-owned subsidiary and marketing arm of Eberline and had negotiated the Western Electric contract for Eberline.

In January 1969, Eberline divested its ownership of Beltronics by selling its stock to the officers of Beltronics. Beltronics then entered into its exclusive sales representative agreement with Eberline to receive from Eberline commissions on the sale to Western Electric of capacitors and capacitor cases manufactured by Capco, Eberline's subsidiary. Beltronics did not inform Western Electric of this change in its status or of its new contractual relationship to Eberline.

In mid-March 1969, Western Electric, believing that Beltronics was still a subsidiary of Eberline, decided not to renew its contract with Eberline for the purchase of capacitors and capacitor cases. The contract was due to expire by its terms on April 30, 1969.

Western Electric arrived at its decision for three reasons, all of which were based upon the misconduct of the officers and now present owners of Beltronics. First, Beltronics had excessively entertained Western Electric's purchasing agents at dinner in violation of Western Electric's gift and entertainment policies, in return for which a Western Electric buyer had furnished to Beltronics confidential price information about capacitors and capacitor products manufactured by others. Second, Beltronics had improperly appropriated and used, without permission, the "Index of Purchase Contracts", an internal, confidential document of Western Electric. Third, Beltronics had misrepresented itself as the manufacturer of capacitors and capacitor cases when the purchase contract had been entered into the previous August, 1968.

I.
Violation of Entertainment and Gift Policies

Beltronics knew of Western Electric's policy prohibiting dinner and entertainment of Western Electric's employees. It is Western Electric's policy that its purchasing agents are not to be taken to dinner by suppliers and sellers, except under very unusual and extenuating circumstances. It is also Western Electric's policy that gifts are not to be given to its purchasing agents and that it is deemed a gift for a supplier to buy dinner for a Western Electric employee when the supplier is not present.

The reason for Western Electric's policy is that:

> "Western Electric feels that the only way they can award any business is on merit. We are concerned with the health of our suppliers. We are concerned about competition, and we feel that the only way we can be objective is to award the business on the basis of merit, and if by any chance the objective judgment of the buyer were influenced in any way direct or indirect or in any manner by gifts or entertainment, we feel this would undermine our policy of awarding business on the basis of merit, and we think it is unnecessary and a very questionable practice, which only raises questions both of the donor and the recipient, and therefore is not an accepted practice or policy with the company." (889-890)

Between March 7, 1967 and February 13, 1969, Beltronics entertained Western Electric purchasing agents at lunch and dinner on 22 occasions. Mr. Frank Artale, a clerk in Western Electric's Purchasing Department who had typing responsibilities for all contracts with all suppliers of capacitors and capacitor cases, was entertained by Beltronics on all 22 of these occasions. Twelve of those entertainment occasions involved dinner. On two occasions, in 1967 and again in 1969, Beltronics arranged for dinner for Artale and his family at the Tower Suite, an exclusive New York restaurant, at

which Beltronics representatives were not present. In return for that hospitality and favoritism, and at Beltronics' suggestion, Artale supplied Beltronics with information about the prices for capacitors and capacitor cases purchased by Western Electric from other manufacturers. (663-67; Exh. ZZZ, 1077, at 1079)

II.
Appropriation of a Confidential Document of Western Electric

Each month Western Electric publishes an "Index of Purchase Contracts," which is a summary listing of Western Electric's purchase contracts. It is used by Western Electric's purchasing agents to order supplies, equipment and materials. It is a private, internal document and is considered by Western Electric to be confidential. In October 1968, Beltronics took a copy of Western Electric's Index of Purchase Contracts from a wastebasket in the office of one of Western Electric's buyers. Beltronics did not ask for and was not given permission to take the Index. The Western Electric buyer was in the office at the time. Of the 22 occasions on which Beltronics had entertained Western Electric buyers at either lunch or dinner, that particular buyer had been entertained on 17 of those occasions, including 7 of the 12 dinner occasions.

III.
Misrepresentation of Beltronics as the Manufacturer

Western Electric believed that it was important to determine the identity of the manufacturer of the products it purchased in order to avoid problems of over dependency on the part of both Western Electric and the manufacturer. Western Electric also desired to be assured of the financial responsibility and capability of the proposed manufacturer to stand behind and service the products.

In the early summer of 1968, when Beltronics was negotiating with Western Electric for the manufacture and sale

to Western Electric of the products, Western Electric received a Dun & Bradstreet report which identified Beltronics as a manufacturer's representative rather than a manufacturer. Western Electric asked Beltronics for a clarification, and Beltronics stated that the Dun & Bradstreet report was wrong and that it would be corrected. Thereafter, in July 1968, Western Electric received a new Dun & Bradstreet report which now listed Beltronics as a manufacturer. Beltronics then helped draw a schematic diagram of the corporate relationships of Beltronics and Eberline which showed that Beltronics was a manufacturer with a plant in Lubbock, Texas. Because of those representations, the Western Electric contract with Eberline in August 1968 stated that Beltronics was a manufacturing subsidiary of Eberline and would manufacture the capacitors and capacitor cases. In truth and fact, that was a deliberate misrepresentation by Beltronics, for Beltronics was nothing more than a manufacturer's sales representative.

In early 1969, Western Electric learned that Beltronics was not the manufacturer.

IV.
The Alleged Boycott and Conspiracy to Boycott

When Western Electric decided in mid-March 1969 not to renew its contract with Eberline, Western Electric communicated that decision to Beltronics. Beltronics communicated that decision to Eberline. Beltronics requested a meeting with Western Electric on April 14, 1969. Eberline also attended that meeting, but its attendance was at the suggestion of Beltronics. There were absolutely no communications or contacts between Western Electric and Eberline or Capco either prior to Western Electric's decision in mid-March or prior to the meeting of April 14, 1969. Western Electric's decision not to do business with Beltronics was unilateral.

At the meeting on April 14, 1969, Western Electric learned for the first time that Beltronics was no longer a subsidiary of Eberline and that the relationship between

Eberline and Capco and Beltronics had, since January 2, 1969, been solely contractual in nature. Eberline stated that it had not known of Beltronics' misdeeds and that it did not condone them. Eberline and Capco then represented that they had already terminated their contractual relationship with Beltronics. Beltronics did not disavow Eberline's statements or representations that the relationships between Eberline, Capco and Beltronics had already been severed.

REASONS FOR DENYING THE WRIT

I.
The Questions Presented for Certiorari Were Not Litigated by the Trial Court

This Court has stated that it will not review on certiorari questions which were not litigated in the lower courts. *Standard-Vacuum Oil Co. v. United States*, 339 U.S. 157 (1950); *McCullough v. Kammerer*, 323 U.S. 327 (1945). That is the posture of this case. The questions presented in the Petition for Writ of Certiorari were not among the issues that were tried in the District Court; no evidence was received upon the issues; no findings or conclusions were made upon the questions presented.

The Petitioner commenced this action in the District Court in and for the City and County of Denver, State of Colorado, on June 23, 1969, just two months after Western Electric's decision. Petitioner brought suit against only Eberline and Capco for breach of the exclusive sales representative agreement. Western Electric was not a party to the suit. Eberline and Capco removed the action to the U.S. District Court. Discovery was pursued and pretrial conferences held, and then, almost a year after the suit was started, the Petitioner was given leave to amend its complaint and to join Western Electric as a party. In the amended complaint, Petitioner asserted claims against Western Electric for monopolization in violation of Section 2 of the Sherman Act, and against Western Electric, Eberline and Capco for boycott and conspiracy to boycott in violation of Section 1 of the

Sherman Act, 15 U.S.C. §§1 and 2. Petitioner did not assert in the amended complaint any allegation that the Respondents had committed any anti-trust violation under the doctrine of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

Six months later, Beltronics was given the opportunity to amend its complaint yet a second time, which it did. However, the claims did not change.

Discovery thereafter ensued on the part of all parties, in the course of which the Petitioner answered interrogatories defining the basis and nature of its claims. Those answers excluded any contention that the Respondents had committed any anti-trust violations under the doctrine of the *Schwinn* case. Pretrial procedures were again initiated and many conferences held. Near the conclusion thereof, Petitioner moved to amend its complaint yet a third time to assert a claim under the *Schwinn* case. At the same time, the Petitioner supplemented its earlier answers to interrogatories by enlarging the description of the basis and nature of its contentions to include for the first time a claim under the *Schwinn* case. The supplemental answers to interrogatories and the third amendment to the complaint were filed almost three years after the suit had been commenced and at a time when it was contemplated that trial was imminent. The third amendment was denied by the trial court on the grounds that it was too late, that it was not based on any newly discovered evidence, and that it had not been a part of the previous amendments liberally allowed.

During the course of the trial, the trial court refused all claim, argument and evidence that Western Electric had violated Section 1 of the Sherman Act in the manner proscribed by the *Schwinn* case. The trial court made no findings or conclusions with respect to that belated contention.

Thus, the Petition for Certiorari should be denied because the questions presented by the Petition were not a part of the claims set forth in the pleadings and litigated in

trial court and were not questions upon which the District Court made findings of fact and entered conclusions of law.

II.
This Court Does Not Review Discretionary Denials of Amendments to the Pleadings

The questions set forth in the Petition for Writ of Certiorari were the subject of the Petitioner's belated, third attempt to amend its complaint. Thus, before the substance of the questions raised by the Petitioner can be considered, the trial court's order denying the motion to amend must first be dealt with. That ruling, of course, involves the application of the Federal Rules of Civil Procedure and is a matter of discretion. This Court has stated that it does not review orders respecting amendments to pleadings since such rulings are discretionary. *Chapman v. Barney*, 129 U.S. 677 (1889); *Sawyer v. Piper*, 189 U.S. 154 (1903). Furthermore, it has been noted by a justice of this Court that ordinarily the trial court's application of the Federal Rules of Civil Procedure will not be accorded review. *Appalachian Power Co. v. American Institute of C.P.A.*, 4 L.Ed.2d 30, 80 S. Ct. 16 (1959).

Therefore, the Petition for Writ of Certiorari should be denied for the reason that Petitioner must first obtain a review and reversal of the order denying the motion to amend. Petitioner has not framed any question respecting the trial court's denial of the motion to amend, and this Court will not review orders relating to amendments or to the application of the Federal Rules of Civil Procedure.

III.
This Case Does Not Turn Upon the Questions for Which Certiorari is Sought

A review and reversal upon the questions presented for certiorari would not alter the result in this case. The trial court's discretionary ruling denying the amendment still stands. It has not been reversed by the Tenth Circuit United States Court of Appeals. Therefore, a review and reversal by

this Court of the Circuit Court's opinion would not entitle Petitioner to any relief since the trial court's denial of the amendment is not in issue. Furthermore, no issue has been framed with respect to the trial court's findings, conclusions and judgment regarding the boycott and conspiracy claims that were litigated.

The Petitioner contended in its appeal to the Circuit Court that the court had abused its discretion in denying the third amendment to the complaint and that the Petitioner was entitled to judgment in the Circuit Court upon the claim stated in the amendment, even though evidence had not been received by the trial court on that claim. The Respondents defended the appeal on the basis that the trial court had not abused its discretion in denying the third amendment and that the amendment did not, in any event, state a cause of action under *United States v. Arnold, Schwinn & Co., supra.* While the Circuit Court felt moved to discuss the failure of the third amendment to set forth a cause of action, the Circuit Court did nothing to disturb the order denying the amendment. To the contrary, the Circuit Court's conclusion of affirmance sustains the order denying the amendment and, therefore, denies the Petitioner any right to relief.

A review by certiorari of the questions presented would be an academic exercise. The result in this case does not and will not turn upon those questions. The verdict and result were sustained on grounds which are not presented by the Petition, and, therefore, it is futile and unnecessary to consider the questions presented for certiorari. Accordingly, the Petition for Certiorari should be dismissed. *Smith v. Butler,* 366 U.S. 161 (1961); *Town of Santa Ana v. Frank,* 113 U.S. 339 (1885); *City and County of Denver v. Denver Union Water Co.,* 246 U.S. 178 (1918).

IV.
There is No Conflict With Applicable Decisions

Petitioner contends that the decision herein of the Circuit Court conflicts with the decision in *United States v.*

Arnold, Schwinn & Co., 388 U.S. 365 (1967). The Petitioner is in error, for the *Schwinn* case involved the sale of bicycles for purposes of resale, whereas the instant case involves the purchase by Western Electric of products for which Western Electric furnished only enough cable and wire to be used as a component part of the capacitor cases. Western Electric did not furnish cable and wire for resale as was done in *Schwinn*.

In the *Schwinn* case, the manufacturer marketed the bicycles by selling them to distributors with restrictions upon the resale by the distributor to the retailers. On the other hand, Western Electric did not sell cable and wire to Eberline for purposes of resale. Eberline was manufacturing capacitors and capacitor cases for purchase by Western Electric, and Western Electric provided cable and wire only for the purpose of manufacturing the particular product and for use only as one of the many components thereof. To that end, Western Electric did not supply unlimited quantities of cable, but only so much as was necessary for the manufacture and fabrication of the products. The provision providing for the use of the cable and wire solely in the capacitor cases appears as a part of the contract between Western Electric and Eberline by which Western Electric purchased the completed capacitors and capacitor cases. There was no separate or general arrangement or agreement whereby Western Electric sold cable and wire to Eberline for any purpose or circumstance. The entire arrangement was limited to the purpose of Western Electric purchasing from Eberline a product to be manufactured by Eberline in accordance with certain performance standards and specifications.

Thus, the decision herein of the Circuit Court is not in conflict with *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Rather, the situation here is analogous to that in *Weather Wise Co. v. Aeroquip Corp.*, 368 F.2d 716 (1972). In that case, Aeroquip manufactured and sold couplings for air conditioning units only to companies that manufactured complete air conditioning systems. The plaintiff was a manufacturer of tubing for air conditioning systems, and because it could not get the couplings from the plaintiff,

it brought an action under Section 1 of the Sherman Act. The Second Circuit rejected the application of the *Schwinn* case, stating:

> "This argument also is not persuasive because Aeroquip's actions did not constitute resale restrictions, but were merely an attempt by Aeroquip to follow its own sales policy of not knowingly selling couplings for resale."

Certiorari was denied, 410 U.S. 990. Western Electric did no more than Aeroquip.

The capacitors and capacitor cases involved in this case are a higher grade product than are otherwise available for industrial use. That is because the telephone products have to withstand higher flash voltages. The original specifications and samples of the subject products were, as admitted by Beltronics officers, improved by Bell Telephone Laboratories. Products submitted by Beltronics for testing in 1968 had in fact failed the quality control test and changes and improvements had to be made in the product. Western Electric's concern for quality control, product integrity, and technical competency are, of course, a legitimate business purpose. *Tripoli Co. v. Wella*, 425 F.2d 932 (3rd Cir. 1970), *cert. den.* 400 U.S. 831; *Kendall Elevator Co., Inc. v. L.B.C. & W. Associates of South Carolina*, 350 F. Supp. 75 (S.C. 1972); *Polytechnic Data Corp. v. Xerox*, 1973-2 Trade Cases, ¶74660 (N.D.Ill. 1973); *Bridge Corp. of America v. The American Contract Bridge League*, 428 F.2d 1365 (9th Cir. 1970), *cert. den.*, 401 U.S. 940.

The specifications provided for the use of Western Electric cable and wire, but there was express allowance for the use of equivalents. There was no evidence that Western Electric denied the use of equivalent cable or wire. The trial court expressly concluded that the purpose of the specifications was not anti-competitive, but was "... to control the quality of the products." That finding is supported by the evidence.

It should be noted that, during the course of the appeal to the Tenth Circuit Court of Appeals, the Petitioner withdrew all contentions against Western Electric of monopolization in violation of Section 2 of the Sherman Act.

Thus, this case is not analogous to and is not in conflict with the *Schwinn* case. The decision of the Court of Appeals herein is, on the contrary, consistent with the decisions in *Schwinn* and the other cases cited above.

V.
There is No Basis for Reviewing the Trial Court's Findings

After having heard voluminous evidence and having had the opportunity to judge the credibility of the witnesses, the trial court made extensive findings, and this case was decided upon that basis. The Court of Appeals concurred in those findings and conclusions.

In question No. 2 and the argument in support thereof, Petitioner takes issue with the statement in the opinion of the Court of Appeals that "in any event we find nothing in the record to show that Beltronics was, or could have been, damaged by the restrictions." That statement is an appellate affirmance that the record substantiates and supports the trial court's findings and conclusion that the Petitioner's alleged injury and damages were not proximately caused by any violation of the Sherman Act. The trial court concluded that Petitioner's injury was proximately caused by Western Electric's refusal to deal with Beltronics because of Beltronics' deceit and deception, because of Beltronics' appropriation of Western Electric's documents without permission, and because of Beltronics' seduction of Western Electric employees contrary to known policies in order to gain favored treatment and information. Specifically, the trial court said:

> "Assuming arguendo that the acts of the parties or any of them were in violation of either Sections 1 or 2 of the Sherman Act, the injury and damage suffered by the plaintiffs were not proximately

caused by any unlawful restraint or monopolization of trade in violation of Sections 1 and 2 of the Sherman Act, but were proximately caused by Western Electric's exercise of its legal right to refuse to deal with Beltronics or with Eberline and Capco so long as they were associated with Beltronics."

Petitioner apparently accepts the trial court's findings for the Petitioner has attempted to structure legal questions for certiorari which it bases on those findings, even though no evidence was received on the questions which Petitioner has framed. Nevertheless, since Petitioner, apparently accepts the trial court's findings, it is also bound by the findings regarding proximate cause, which findings have support in the evidence. This Court has refused certiorari review of trial court findings under similar circumstances. *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

It is not enough that the U.S. Supreme Court might give the facts another construction than that accorded by the trier of fact. When the trier of fact's findings are supported by the evidence, as is so obviously and amply the situation in the case at bar, then review of those findings by certiorari is not warranted. *United States v. National Association of Real Estate Boards,* 339 U.S. 485 (1950).

Petitioner discusses at length the decision of *Perkins v. Standard Oil Company of California,* 395 U.S. 642 (1969), and argues, in essence, that the conclusions herein are in conflict with the decision in that case. However, there is no conflict, for in *Perkins v. Standard Oil Company of California, supra,* this Court deferred to the trier of fact upon the issue of proximate cause. In the case at bar, this Court should similarly decline to interfere with the findings of proximate cause made by the trier of fact.

Since the trier of fact has, with justification and reason, found that any violation of the Sherman Act is not the proximate cause of Petitioner's claimed injury it is futile and unnecessary to consider the other questions presented for certiorari.

VI.
This Case Does Not Involve Any Question of Great Public Importance

As reflected in the statement of the case, this case turns on its own particular set of facts, namely, Beltronics' premeditated and repeated violation of Western Electric's known policies prohibiting dinners and gifts and entertainment, Beltronics' appropriation of Western Electric documents without permission, and Beltronics' misrepresentation. These are matters of interest solely to the parties. The case does not involve any question of great public importance, and, accordingly, certiorari should be denied. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387 (1923); *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *Rudolph v. United States*, 370 U.S. 269 (1962).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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